QUESTION PRESENTED

May Congress constitutionally assign to the Secretary of Transportation the power to select tax rates to finance Department of Transportation regulatory programs.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Other Authorities: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
Appellant,

v.

MID-AMERICA PIPELINE COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of Oklahoma

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BRIEF FOR APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by the Government (Gov't Br. at 2-3), Article I, Section 7, Clause 1 of the Constitution (the "Origination Clause") provides: "All Bills for raising Revenue shall originate in the House of Representatives . . . ."

STATEMENT

A. The Statute And Its Application

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 140-41, instructs the Secretary of Transportation to raise revenue sufficient to finance the Department of Transportation's ("DOT" or the "Depart-

ment") pipeline regulatory programs.[1] The costs to be recovered comprise the whole range of direct and indirect governmental expenditures, including, for example, "administrative expenses (salaries, travel, printing, communication, supplies, etc.), regulatory, enforcement, training and research costs, and State grants-in-aid." J.A. at 37. The Secretary is told to apportion the costs among pipeline companies and to devise a schedule of assessments "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." Section 7005(a)(1).

Section 7005 is one of a number of new "revenue-enhancing measures" fashioned along a similar model. The goal of these devices—to deal affirmatively with the federal deficit problem without incurring the political risk of new tax assessments—has been widely reported, and the implementation of this goal in recent statutes has taken various forms, including grants of authority to the Federal Energy Regulatory Commission,[2] to the Nuclear Regulatory Commission,[3] and to DOT to impose annual assessments sufficient to recoup all or a specified portion of their regulatory budgets.

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[1] The regulatory programs in question are the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) § 2001 *et seq.*, and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) § 1671 *et seq.* These programs establish a regime of regulatory standards which are enforced through a system of inspections; violation of DOT regulations may subject a pipeline to a range of civil and criminal penalties.

[2] The delegation to FERC was ultimately enacted as Section 3401 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1890-91. Section 3401 directs the Commission to formulate and impose annual charges sufficient to cover the Commission's entire regulatory budget, and to select any basis for formulating the assessments that is "fair and equitable."

[3] *See* COBRA § 7601(a), 100 Stat. 146-47.

In enacting Section 7005, Congress was plainly intending to supplement the authority that the Department of Transportation already possessed, under a separate statute,[4] to impose "specific fees for specific inspections," or otherwise to recover costs that individual pipelines imposed on the agency in connection with its programs. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). By contrast to this existing authority, Section 7005 instructs the agency to recover all of its general regulatory costs, including, for example, the costs of conducting research and providing federal grants to the States, irrespective of any costs an individual firm caused the agency to incur. J.A. at 37.

Congress frankly acknowledged the substantive discretion it was conferring upon the Secretary in allocating the tax burden among members of the pipeline industry.

> Because the costs of administering DOT's program are shared by the entire pipeline industry, some reasonably equitable formula for spelling out each pipeline's portion of those total costs has to be selected by the Secretary.
>
> This subsection specifies that the formula must be "reasonable," and gives the Secretary discretion to select among several different approaches for allocating total costs fairly among the various pipelines.

H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

In a notice that appeared in the *Federal Register* on July 16, 1986, the Department announced that it had selected "pipeline mileage" as the basis upon which to make its assessments. J.A. at 35. On July 28, 1986, DOT issued a notice of assessment to appellee Mid-America Pipeline Company demanding payment of $53,023.52. Because pipeline miles were selected as the basis for this assessment, Mid-America paid an assessment proportionately higher than pipelines which gen-

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[4] Independent Offices Appropriation Act of 1952, 31 U.S.C. § 9701.

erate more revenue or move greater volumes over a shorter distance.

Mid-America receives no direct services from DOT and is not dependent on the agency for permission to operate. The Department's relationship to Mid-America and other pipelines is strictly that of a policing agency: DOT promulgates safety standards which it enforces through inspections, testing, and other enforcement measures. Mid-America makes no application for licensing, seeks no benefits from DOT services, participates in no voluntary proceedings before the Department, and otherwise has little contact with DOT except as a potential object of DOT enforcement schemes.

B. The Proceedings Below

This action was filed in the United States District Court for the Northern District of Oklahoma on September 4, 1986. Mid-America and the Government filed cross-motions for summary judgment which were assigned to a magistrate for consideration. After holding a hearing on the motions, the Magistrate issued Findings and Recommendations. *See* Appendix to Jurisdictional Statement at 1a-13a. Applying the standards established by this Court in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), the Magistrate rejected the Government's attempt to characterize Section 7005 assessments as mere "fees," for these were plainly involuntary exactions imposed on pipeline companies to cover the general regulatory activity of the agency and not an attempt to measure the costs that Mid-America may have imposed on the agency. Magistrate Wagner held that under *National Cable*:

> Where [as here] no request for an agency's services is made and no specific benefit is conferred upon the one being assessed, the assessment cannot be labelled a "fee" . . . .
>
> The assessment under § 7005 is not "incident to a voluntary act" . . . nor does it "bestow a benefit on

> the applicant not shared by other members of society" . . . . It, too, could easily be likened to "an involuntary exaction for a public purpose," . . . the purpose being the regulation of natural gas and hazardous liquid pipeline usage. Therefore, the Magistrate concludes that the "fees" assessed under § 7005 are taxes.

J.S. App. at 4a-5a. In addition, the Magistrate concluded that the breadth of discretion afforded the Secretary in setting these fees was in no way comparable to the directions Congress gave administrative officials in any cases cited by the Government:

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes.

Id. at 10a. He therefore concluded that Section 7005 was an unlawful delegation of Congress' power to tax. *Id.* at 10a-11a. After full re-briefing, on December 30, 1987, the district court issued an order adopting the Magistrate's recommendations. *Id.* at 14a. Judgment was entered on February 9, 1988, (*id.* at 15a-16a), and this direct appeal followed. *Id.* at 17a. Although the Government thereafter introduced legislation that would have established the rate of assessment by statute, that bill was subsequently withdrawn.[5]

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[5] Subsequent to the district court's decision below, the Department drafted a proposed legislative amendment to Section 7005 in an effort to cure the statute by eliminating the Secretary's discretion to select a taxing formula. *See* H.R. 2266, 100th Cong., 2nd Sess. § 301 (1988). The proposed amendment would have replaced the discretion afforded the Secretary to choose a rate with a congressionally-chosen criterion: "in *miles* of natural gas transmission and hazardous liquid pipelines . . . ." *Id.* (emphasis added). The

SUMMARY OF ARGUMENT

1. The Constitution establishes, and the three Branches have historically always respected, a careful separation of responsibilities regarding tax law, beginning with the commitment that "All Bills for raising Revenue shall originate in the House of Representatives." Art. 1, § 7, cl. 1. There is a precise history to that commitment, deeply rooted in colonial worries about taxation without representation. The Origination Clause in response to those concerns requires that legislators—in particular, congressmen, frequently and immediately accountable to the people by virtue of their two-year term—must pass on tax legislation. By knowing their representative's position on the levy of a tax, the people can respond to any perceived unfairness in the most elemental way allowed in a democracy, by casting their own votes against, and withholding their support from, those who supported the particular tax. For this reason, under the Constitution, "Congress [] is the sole organ for levying taxes. . . ." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974).

The method of making tax law embodied in Section 7005 nullifies the plain terms and frustrates the intended purpose of the constitutionally prescribed method of making tax law. In Section 7005, Congress remits to an executive official, beyond the reach of the electorate, the most crucial of all taxing decisions, the allocation of the tax burden among firms and individuals. The people are thus deprived of their right to know how their direct representatives stand on that decision, in plain contra-

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section-by-section analysis accompanying the proposed amendment explained the reason for the change as follows:

> . . . this amendment would clarify the intent of Congress in adopting Section 7005, and prescribe in the statute the only criteria which reasonably reflects the relationship between the Department's pipeline safety program and pipeline operations.

Id. The proposed amendment was deleted, however, prior to House consideration of H.R. 2266 (under suspension of the rules) on April 19, 1988. *See* 134 Cong. Rec. H1670-H1680 (April 19, 1988).

vention of the Origination Clause. According to the model of tax lawmaking established by Section 7005, taxes are not originated by bills, but by agency rules, and those rules originate not in the House of Representatives, but in a notice of proposed rulemaking in the *Federal Register*. Section 7005 thus circumvents "the carefully crafted restraints spelled out in the Constitution," (*INS v. Chadha*, 462 U.S. 919, 959 (1983)), and thwarts "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

2. Section 7005 is also unconstitutional for the distinct but related reason that it attempts to assign a non-delegable lawmaking function to an executive officer in a manner fundamentally at odds with principles of separation of powers. The Constitution requires "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). Although "a practical construction of the Constitution" sometimes requires Congress to delegate substantive discretion to the Executive, "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892). Similarly, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Chadha*, 462 U.S. at 953 n.16, *quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

The propriety of an assignment of substantive authority by the Legislative Branch to the Executive depends upon the nature of the power being delegated, (*see Lichter v. United States*, 334 U.S. 742, 778 (1948)), the competence of the respective branches in an institutional sense to exercise that power, (*see National Cable* 415 U.S. at 340-42), and the extent to which its exercise in

a particular instance may fairly be considered the "execution of the law in constitutional terms." *Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986). The Executive Branch enjoys no special competence in the field of taxation that would make it appropriate for executive officials to allocate tax burdens among the citizenry in the form of rules having the force of law. On the contrary, taxation is—and has always been—"a legislative function." *National Cable*, 415 U.S. at 340. Section 7005, by delegating the most delicate aspect of the taxing power—the power to allocate the tax burden by establishing tax rates—undermines the historic separation of the Branches in tax matters and "carries [the Executive Branch] far from its customary orbit. . . ." 415 U.S. at 341.

Neither can the assignment of taxing power to the Executive Branch in Section 7005 be described as merely the "faithful execution of the law." The "inherent necessities of . . . governmental coordination" often require that legislative programs be implemented not by inflexible statutory rules but by flexible delegations to the Executive. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). Thus, the Court historically has deferred to any colorable assertion that the best way to address some problem is not through a fixed statute, but rather a flexible rule for executive officials to apply to the myriad facts and circumstances that might arise over time, even to the extent of allowing executive officials to make "quasi-legislative" rules to implement that program. In this case, however, there was no program to "faithfully execute," only an unpopular taxing decision to make. Where Congress attempts to transfer to executive officials, particularly in the taxing area, the power to make the decisions that Congress was unwilling to make, that assignment cannot be reconciled with the constitutional separation of powers. If the language in the Constitution is to have any meaning, the unadorned power to make law cannot also be the faithful execution of the law.

ARGUMENT

CONGRESS MAY NOT ASSIGN THE TAXING POWER TO THE DEPARTMENT OF TRANSPORTATION.

The simple command of the Origination Clause—that all tax legislation should originate in the House of Representatives—emanates from a familiar historical premise, taught to many of us in high school, that there should be "no taxation without representation." Section 7005 now puts at issue the care with which the Framers incorporated this deeply rooted premise into the constitutional text.

In Section 7005, Congress instructs an administrative agency to establish both the subject matter and the rates of tax. The Government seeks to justify this action by rewriting the constitutional text, claiming to see no Origination Clause difficulty so long as, under the Government's reading of that Clause, "All Bills *authorizing the Executive Branch to decide* how to raise Revenue" originate in the House of Representatives. But the Government's attempt to justify taxation by administrative rulemaking trivializes not only the constitutional text, but the basic principles that are embraced by that text. There may be good, and constitutionally sufficient, reasons to allow Congress to delegate substantive decision-making power to executive officials in some cases—because some broad congressional purpose arguably demands that the Executive be left with flexible decision-making power as a necessary concomitant to the "execution of the laws." But a brief history of the taxing power shows why the Constitution requires revenue raising to be conducted on very different premises, premises that emphasize the accountability of elected officials, directly to the people, for the federal government's taxes.

I. Constitutional Restraints On Exercise Of The Taxing Power Are Deeply Rooted In Our Heritage.

A. *The Origination Clause And Its Historical Foundations.*

For the population in the American colonies, "[p]opular control of taxation was deemed the very foundation of representative government. . . ." E.J. Ferguson, *The Power of the Purse* 111 (1961). Tracing its historical lineage from the English "rule of Government," which afforded the House of Commons the exclusive prerogative to originate money bills, the precept of popular control over taxation shares both the philosophic and pragmatic underpinnings of the English system. "The general reason given for this privilege of the house of commons is that the supplies are raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves." 2 J. Story, *Commentaries on the Constitution of the United States* § 871 (DeCapo ed. 1970); 1 W. Blackstone, *Commentaries* 163-64 (1765). More specifically, the rule reflected the conviction that a "temporary, elective body, freely nominated by the people" would better resist the demands of the Crown for additional money. 2 J. Story, *supra*, at § 871; 1 W. Blackstone, *supra*, at 163-64.

With the power of the House of Commons as their model, the colonial assemblies insisted upon their right to exercise the same privileges and prerogatives as the English Parliament. Thus, beginning in Massachusetts, colonial assemblies asserted control over taxation as a means of constraining the power of the colonial Governors, the colonial "Executive Branch," appointed by the Crown: "The exclusive right to levy taxes, which the charter of Massachusetts gave its assembly, became the universal practice in the country, and the principle which it embodied became the fundamental American concept of government." 1 F.N. Thorpe, *The Constitutional History of the United States* 15 (1970). Through the assemblies' control of the purse, the colonists controlled

their government. *See* A.H. Kelly & W. A. Harbison, *The American Constitution* 31 (1948) ("This victory over the purse strings, recapitulating as it did a like victory by the House of Commons over the Crown, was of tremendous importance in the growth of colonial internal autonomy").

The abhorrence of "taxation without representation," and the view that it was among the most basic rights of a civilized people to control directly those who would tax them, triggered a series of grievances (ultimately leading to the Revolution). The commitment to popular control of taxation, for example, was embodied in the reaction to the Stamp Act, and succinctly stated in the Declaration of Rights of the 1765 Stamp Act Congress,[6] in which, "respecting the most essential rights and liberties of the colonists," the congress declared:

> That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives.

Quoted in 2 P.B. Kurland & R. Lerner, *The Founders' Constitution* 375 (1987). While the remonstrances against the Stamp Act resulted in its quick repeal, that reprieve was short-lived. "[U]nder the influence of the stubborn George III, the policy of arbitrary taxation for the colonies was resumed in a new mode," ultimately

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[6] The Stamp Act, which the British Parliament passed in 1763, sought to tax the colonists to support the prosecution of the French and Indian War. Although the tax itself was rather modest, its arbitrary imposition on the colonists, who had no voice in its enactment, created a furor. Delegates assembled for the convention in New York City in October 1765 and renounced the Act. That assembly—which later came to be known as the Stamp Act Congress—produced a Declaration of Rights in which it urged repeal of the Act. Early the next year, the Stamp Act was repealed. *See generally* J. Schouler, *Constitutional Studies: State and Federal* 79-80 (1971).

prompting an outbreak of violence and the calling of the Constitutional Congress. J. Schouler, *Constitutional Studies: State and Federal* 80 (1971).

Following the Revolution, there was at first so deep-seated a commitment to local popular control over taxation that the first effort to form a central government under the Articles of Confederation denied the central government any taxing power at all. Against this backdrop, it is hardly surprising that one of the most sharply debated issues during the Constitutional Convention and ratification process was not merely the need for a centralized power to tax, but the way to constrain its exercise. Although the Framers acknowledged the need for a government with revenue-generating authority, they continued to recognize that, in Madison's words, there was no power more dangerous than the taxing power. *See The Federalist No. 10*, at 57 (Modern Library ed. 1937). They therefore sought protection against its abuse in the structure of government they created.

The Origination Clause, as originally proposed, was intended to prevent the "senatorial branch from originating money bills." As Elbridge Gerry, one of its principal proponents, put the matter: "The other branch [the House of Representatives] was more immediately the representatives of the people, and it was a maxim, that the people ought to hold the purse-strings." 5 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 188 (1896). As Gerry later explained, "[T]axation and representation are strongly associated in the minds of the people; and they will not agree that any but their immediate representatives shall meddle with their purses." *Id.* at 416.[7]

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[7] Although Mr. Dickenson, speaking in support of the proposal, declined to offer a theoretical rationale for the rule, he found an empirical one: "[E]xperience verified the utility of restraining money bills to the immediate representatives of the people," and he saw no reason to "upset the people by disturbing their customary

In support of the Origination Clause before the Convention and in the States, the remarks of the Framers summarize the reasons why taxation was committed to Congress, and why the House would have to play a special role in regard to revenue raising.

1. Voicing his support for the Origination Clause and the more general principle of direct democratic control over those who would make taxing decisions, Benjamin Franklin explained that

> it was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim, that those who feel can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.

5 *Elliot's Debates*, *supra*, at 284. As Franklin's comment suggests, the requirement that revenue bills be initiated in the House of Representatives serves two closely related purposes: it preserves immediate political accountability for the federal government's taxing decisions and allows the people to influence directly the shape of tax legislation through access to their direct representatives. Put more bluntly, the Origination Clause forces at least one member to move the introduction of a tax bill and compels all of them to decide, one way or the other, how taxes shall be laid. Based on the vote of their representative, the "people can then mark him" [8]—and take appropriate action at the ballot box at the next biennial election.

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right." 5 *Elliot's Debates*, *supra*, at 418. Mr. Randolph put it more colorfully: "When the people behold in the Senate the countenance of an aristocracy; and in the President, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives a right which has been so long appropriated to them." *Id.* at 419.

[8] 5 *Elliot's Debates*, *supra*, at 189 (Williamson).

2. At the Virginia Convention, John Marshall built upon the theme that the federal government could not impose a tax without the House passing on the question; because the members of the House were immediately beholden to their constituents for their office, the people would be protected from unfair taxation:

> Is the system so organized as to make taxation dangerous? . . . . No tax can be laid without the consent of the House of Representatives. . . . We are told that they may abuse their power. Are there strong motives to prompt them to abuse it? Will not such abuse militate against their own interest? Will not they and their friends feel the effects of iniquitous measures? Does the representative remain in office for life? Does he transmit his title of representative to his son? Is he secured from the burden imposed on the community? To procure their reelection, it will be necessary for them to confer with the people at large, and convince them that the taxes laid are for their good.

3 *Elliot's Debates, supra*, at 230-31.

3. Finally, James Madison's letter to the People of New York anticipated the way that citizens would exercise control of the other branches through the House of Representatives' control of the purse strings:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. *This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of*

> *the people*, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 380 (Modern Library ed. 1937) (emphasis added).

Thus, at the same time as the Framers regarded the power of taxation to be among the most important and far-reaching afforded the National Government, they entrusted protection from its abuse to the structure of the government they established. As John Marshall, as Chief Justice, explained in *McCulloch v. Maryland*, the need for close adherence to the structure of government as prescribed in the Constitution provides the *only* assurance against unwise taxation.

> It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.
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> *The people . . . give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interests of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse.*

17 U.S. (4 Wheat.) 316, 428 (1819) (emphasis added).[9]

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[9] *See also Spencer v. Merchant*, 125 U.S. 345, 355 (1888) ("The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected") (citations omitted).

B. *Historically, The Careful Delineation Between The Roles Of The Legislative And Executive Branches In Matters Of Taxation Has Always Been Respected.*

1. *Congress Has Always Set Tax Rates.*

Following the constitutional prescription, for nearly two hundred years, Congress has guarded its prerogative to determine tax rates. Despite a continual (albeit necessary) congressional preoccupation with revenue-raising, the fundamental function which the people associate with taxation—the allocation of the tax burden—has remained the exclusive prerogative of Congress.

Congress' early revenue raising efforts mirrored the conventions of the day, including the kinds of imposts that the Crown had imposed—"duties" on stamps for official documents, import duties upon a wide variety of commodities, including tobacco, liquor, salt and sugar, and excise taxes on liquor and carriages.[10] These early laws aptly illustrate the tenet that Congress allocates the burdens of a tax. Thus, in its second enactment, Congress set forth in great detail the rates of taxation (Act of July 4, 1789, ch. 2, 1 Stat. 24), and later revised those rates several times within the First Session. At the same time, the role of the Executive Branch was entirely administrative, not substantive: The Secretary of the Treasury was directed "to prepare plans [and] . . . superintend the collection of the revenue." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65.

Similarly, the early revenue acts cited by the Government as "important evidence" of a broad substantive role expected for the Executive Branch in matters of taxation (Gov't Br. at 14) are as illuminating as any in evidencing Congress' commitment to the setting of tax rates, and the assignment to the Executive Branch of the en-

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[10] *See generally* D. Forsythe, *Taxation and Political Change in the Young Nation* 24-25 (1977).

forcement and collection for which that Branch was suited. In every instance cited by the Government, Congress set the rate with specificity and detail:

- The Act of March 3, 1791, ch. 15, §§ 1, 3, 1 Stat. 199, set duties on distilled spirits, describing those duties with specificity. The only authority granted the Secretary of the Treasury was the execution and enforcement of the law in a classic sense, including the power to compromise penalties that had been assessed where he concluded there had been no willful violation.

- The Act of June 5, 1794, ch. 48, §§ 1, 2, 1 Stat. 376, set forth, again in precise detail, duties to be imposed "on licenses for selling Wines and foreign distilled spirituous liquors by retail." Chapter 49, relied on by the Government, was concerned with the *collection* of those and similar duties. It allowed the President to set up taxing districts to which he would appoint supervisors and inspectors (revenue agents, *see* § 12) to collect the duties.

- The Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527, which the Government describes as "most instructive" (Gov't Br. at 14), describes in great detail the duties on official documents (*i.e.*, a stamp tax) that Congress imposed under the Act. The tax rates are clear and precise.[11]

In short, if the Constitution had allowed it, we might have had a government under which the legislature would determine the total amount of revenue to be raised and the sheriff authorized (subject to certain limitations) to obtain those sums, determining how much and from

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[11] The provision of this law specifically cited by the Government (§ 2) simply allowed that in lieu of the computation of the stamp tax on the notes of banks, the Treasury could agree to "an annual composition for the amount of such stamp duty . . . of one per centum on the amount of the annual dividend made by such banks, to their stockholders respectively." 1 Stat. 528. The rate of assessment was clear, precise and determined by Congress.

whom those sums should be taken. Or, following the model of the Articles of Confederation, Congress might simply have determined what was needed and "requisitioned" the Executive Branch to provide those sums using various devices of the Executive's choosing. Although the convenience and efficiency of such methods of revenue-raising must have been apparent even in the 18th century, that is not what the Constitution provided, and that is not what Congress historically sought to implement.

Although the development of federal income taxation after 1913 gave Congress new flexibility in taxing, this has not disturbed the fundamental division of responsibility between Congress and the Executive in matters of taxation. While Congress has long charged the Secretary of Treasury with the power to collect taxes and enforce the Internal Revenue Code, and to make rules associated with that mission (*see* 26 U.S.C. § 7805), executive officials have not been given the authority to allocate the taxing burden by setting tax rates. Rather, the Secretary's role is to enforce and administer—to oversee the identification of income subject to tax and to collect the taxes prescribed by Congress. As the Service's own Statement of Principles explains:

> The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress. With this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner. . . .

Rev. Proc. 64-22, 1964-1 CB 689, regularly published in the *Cumulative Bulletin.*

The limited role of the Executive in tax matters is further reflected by the fact that although the Secretary of the Treasury may issue *interpretive* regulations, those

regulations are denied the force of law. Thus, *unlike* other executive agencies, which have been granted the authority to promulgate "quasi-legislative rules," Treasury regulations are not binding as law on the courts. As the Court has repeatedly emphasized, the Secretary's authority "to prescribe rules and regulations . . . is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equipment Co. v. C.I.R.*, 297 U.S. 129, 134 (1936).[12] The Secretary of the Treasury is authorized to make rules, *with* binding effect, *only* in certain esoteric areas of income definition and in matters of enforcement and collection. *See, e.g.*, 26 U.S.C. § 1502 (directing the Secretary to prescribe regulations relating to the filing of consolidated tax returns).

2. *Decisions Of This Court Have Maintained The Division Between The Legislative And Executive Roles In Matters Of Taxation.*

More recently, this Court's decisions in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) and *Federal Power Commission v. New England Power Co.*, 415 U.S. 345 (1974), have confirmed the constitutional impediments that stand in the way of any attempt by Congress to grant executive agencies authority in this field. In these cases, the Court was presented with attempts by the Federal Communications Commission ("FCC") and the Federal Power Commission ("FPC"), at the statutory invitation of Congress, to recoup the full costs of their regulatory activities by imposing assessments on the firms subject to their respective juris-

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[12] *See also Helvering v. Sabine Transp. Co.*, 318 U.S. 306, 311-12 (1943) (invalidating Treasury Regulations designed to deny to a corporation "dividends paid credit" that were properly claimed under the Revenue Act of 1936 as an improper "attempt to legislate"); *Kurzner v. United States*, 413 F.2d 97 (5th Cir. 1969); *United States v. Empey*, 406 F.2d 157 (10th Cir. 1969).

dictions. Relying on the Independent Offices Appropriation Act of 1952 ("IOAA") (now codified at 31 U.S.C. § 9701), directing agencies to assess fees to recoup fully the costs of their regulatory operations, the FCC and FPC developed "fee schedules" designed to make the agencies economically self-sufficient. *See National Cable*, 415 U.S. at 339; *New England Power*, 415 U.S. at 348-49.

In rejecting a construction of the IOAA that would have allowed—as it seemed to allow—federal agencies to set the rates to finance their activities, this Court held that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341. The Court noted that to have read the statute literally "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House" and that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power . . . ." *Id.* The Court emphasized the difference between allowing an agency to determine what to charge for the specific costs that a given firm imposed on an agency, *i.e.*, fee-setting, and the broader power to raise revenue to fund the agency's general costs of operation, a question of taxation in the sense contemplated by the Framers. In short, the Court concluded that because "[t]axation is a legislative function" and "Congress [] is the sole organ for levying taxes," (*id.* at 340), the IOAA had to be read "narrowly as authorizing not a 'tax' but a 'fee.'" *Id.* at 341.[13]

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[13] The lower courts have consistently recognized the constitutional underpinnings of *National Cable*. *See Sohio Transp. Co. v. United States*, 766 F.2d 499, 503 (Fed. Cir. 1985) (*National Cable* is premised on the recognition that it would be "an unconstitutional delegation of Congress' exclusive power to tax" for agencies to be allowed to impose charges to recover expenditures for the public interest); *Central & Southern Motor Freight Tariff Ass'n v. United*

II. The Method Of Making Tax Law Under Section 7005 Contravenes The Origination Clause And Eliminates Legislative Accountability For Taxing Decisions.

The question posed by this case is whether the Constitution bars Congress' attempt to assign the authority to set tax rates to an Executive Department. The first obstacle to such assignment is the Origination Clause: Section 7005's delegation of tax-setting authority to an unelected administrative official circumvents the process of making tax law defined by the Origination Clause and defeats the objectives the Framers specifically designed it to achieve. To allow agency officials to make the tax writing decisions the Framers intended our immediate representatives to make (here, the allocation of the tax burden among pipelines) renders the Origination Clause an "empty formality." *Chadha*, 462 U.S. at 958 n.23.

States, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies are prohibited from assessing fees in order to recover the full costs of regulation because such charges are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *National Ass'n of Broadcasters v. Federal Communications Comm'n*, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976) (*National Cable*, "as part of the basis for its opinion, relied on Art. I, § 1 and § 8, par. 18 of the Constitution in holding that taxation is an essential legislative function that Congress cannot 'abdicate or transfer to others' "); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied by Congress"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 227 (5th Cir. 1979) (*National Cable* construed the IOAA narrowly so as not to "offend the constitutional mandate that only Congress has the 'Power to levy and collect Taxes' "), *cert. denied*, 444 U.S. 1102 (1980); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983) ("The Court said that assessing industry members for the costs of oversight over the entire industry would require the members to pay 'not only for benefits they received but for the protective services rendered the public by the Commission' in its regulatory role, and suggested that such an assessment might be an unconstitutional tax"). *But see Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988).

A. *The Process Of Making Tax Law Described By Section 7005 Is Not The Process That The Constitution Requires.*

First among the enumerated powers of Article I, the taxing power is entrusted to Congress: "The Congress shall have Power To lay and collect Taxes . . . ." Art. I, § 8, cl. 1. And with unusual specificity, the Origination Clause requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . .," (art. I, § 7, cl. 1), whose members were made frequently and directly accountable to the electorate for their decisions (art. I, § 2, cls. 1, 3). The Constitution itself, therefore, sets forth rather precise procedural safeguards against abuse of the taxing power. Those procedures are designed to maximize the people's control over the taxing decisions of the federal government by assigning special responsibility to the House whose members must pass the voters' scrutiny every two years.

The Origination Clause is among those "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha*, 462 U.S. at 945. Like the bicameral requirement frustrated by a similarly innovative method of making law in *Chadha*, this additional provision of Article I, § 7 reflects the Framers' attempt to control the tendencies they feared in a centralized federal government. Specifically, this Clause is designed to compel Congress, at the initiative of the House of Representatives, to frame the bills, and enact the statutes, that decide who is to pay how much to support the federal government. Under the Origination Clause, revenue must be raised by *bills*, not by agency rules, and those bills must originate in the *House of Representatives*, not in a notice of proposed rulemaking published in the *Federal Register*.[14]

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[14] This Court has not heretofore hesitated to sustain separation-of-powers claims that rest upon departures from the plain textual

Section 7005 departs in a most fundamental way from the constitutional scheme: the means of allocating the government's tax burden is now to be established by an executive bureaucracy beyond the control of the electorate. The taxing and spending functions are thus effectively combined in the Executive, relieving obvious pressures on both Branches but diminishing the accountability of both as well. This delegation of authority—held on indistinguishable facts in *National Cable* to involve the assessment "of 'taxes,' which under our constitutional regime are traditionally levied by Congress," (415 U.S. at 341) —involves the most delicate issue of taxation, the selection of tax rates. Although determining how much total revenue the government needs is surely important, the question of taxation with which people are ultimately concerned is how a tax will affect them, individually, in the pocketbook. The sting of taxation is in its allocation —deciding who shall pay how much relative to others— and it is here that the difficult and politically sensitive choices are made.

The legislative decision delegated by Section 7005 is just this power to set tax rates—*i.e.*, the *distributive* decision is left entirely to the agency. Mid-America's allocated share of the industry's tax burden depends entirely on which of the four "choices" for apportionment was selected by the agency: "volume-miles," "miles," "revenues," or "an appropriate combination thereof." Because there is a ceiling on the total amount to be recovered,[15] any formula that reduces someone else's assessment increases Mid-America's, rendering the determination one of particular sensitivity.

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requirements of the Constitution. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (Appointments Clause); *INS v. Chadha*, 462 U.S. 919 (1983) (bicameral requirement and Presentment Clause). There is no reason to allow a departure from that text here.

[15] Section 7005 requires DOT to make assessments not exceeding 105 percent of the agency's program budget. Section 7005(d).

Section 7005 commits this determination to an administrative context that possesses neither the "public" qualities of the legislative arena nor, more importantly, decisionmakers who are immediately accountable for what they decide: [16]

1. The reason that revenue raising was committed to legislators is because congressmen are elected and thereby accountable for their decisions in a way that administrators are not. The difficulty with a transfer of legislative authority to executive officials is not

> that such "faceless bureaucrats" necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are.

J. Ely, *Democracy and Distrust* 131 (1980). The Framers' assignment of taxing authority to Congress, and more particularly to the House of Representatives, guaranteed to the people the one sure means of curbing unfairness in the exercise of that power: the ability to turn their representatives out of office.

In its passing treatment of the Origination Clause, the Government argues that the House was made the originator of tax bills because the Framers "believed that the House of Representatives would 'possess more ample means of local information.' " Gov't Br. at 14 n.7 (citation omitted). The Government then argues that times have changed, and that Congress could now justifiably conclude that the conditions that made the House of Rep-

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[16] The fact that Section 7005 is not the only recent enactment authorizing an executive agency to recoup its costs by imposing annual assessments upon those it regulates should "sharpen rather than blunt" this Court's scrutiny. *See Chadha*, 462 U.S. at 944. Given the obvious attraction that avoidance of unpopular decisions holds for elected officials, the Court's holding in this case will likely shape for decades to come the manner in which the federal government finds it convenient to fund its activities.

resentatives the appropriate taxing authority in the eyes of the Framers no longer exist. It says that:

> Today, in a much more complex society, Congress could rationally conclude that only by conferring broad authority on the Executive to investigate conditions in particular industries would sufficient "local information" be generated to allow satisfactory fee schedules to be fixed.

Id. But to find in the Origination Clause—or indeed, in the House of Representatives—nothing more than a vehicle for obtaining "local information" on "conditions in particular industries" is to ignore the basic purpose of representative government and the role of the House in ensuring representativeness.

The problem with the Government's theory is that under a statutory delegation like Section 7005, people are deprived of the opportunity—particularly as respects the House of Representatives, whose members must face the electorate every two years—to use the election as a referendum on their legislators' votes. A voter cannot demand accountability from his congressman on tax matters if that congressman can simply create a process under which he need never take a stand on the taxing issue upon which he might be judged, the allocation of the tax burden upon his constituents.

2. Delegations like Section 7005 also change the process by which interested parties can influence taxing decisions directly. Citizens have historically enjoyed remarkable recourse to congressmen, congressional committees and their staffs, to weigh in on the way that taxes will be levied. This type of face-to-face exchange with the decisionmakers on tax issues, perhaps the most pervasive activity of Congress, appears to function well—or, at a minimum, as the Framers intended. Recourse to the administrative rulemaking process carries with it none of the political or public elements that the Framers plainly

expected to be part of the process of tapping the people's purses.

3. Finally, as James Madison predicted (*supra* at pp. 14-15), the power of the purse has in fact become one of the most effective means by which the House of Representatives exercises supervisory control over executive agencies, and the people (through their control of the House) thereby exercise control over the activities of the federal government. The process by which Congress has called agency heads to account for the yearly appropriation increases they seek—and, in so doing, called upon those officials to explain how they are spending money, to what end and with what degree of waste and inefficiency—has proven a forceful check on executive activity. Such oversight, by its nature, checks regulatory growth. The impetus for oversight comes, of course, from Congress' understanding that it will be answerable for every increase in agency spending because it is the body that must raise taxes to pay burgeoning administrative costs. Section 7005 and its progeny remove the impetus for congressional oversight over agency activity. A self-financing agency can avoid congressional inquiry about increased spending levels, increased regulatory activity, and possible agency inefficiency, simply by assuring Congress that *Congress* need take no action because the agency is self-financing.[17]

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[17] It could be argued that this tendency to allow agencies to function on "automatic pilot," without significant budgetary oversight, might be present even if Congress establishes the allocation. This is not correct. *First*, if Congress was required to allocate the tax burden in the first instance (and suffer the consequences), it is arguable that it would not have created the tax in the first place. *Second*, if Congress had established the formula, and was answerable for it, then every increase in congressional appropriations to an agency would be through Congress' formula, to burden the taxpayer. Congress could not so easily blink its responsibility for the agency's actions and the resultant increases in taxes.

That it may be convenient to allow agencies to fund themselves through formulas of their own choosing is, of course, quite beside the point. Concededly, from a political, and perhaps even utilitarian point of view, the model of self-financing executive satrapies suggests obvious efficiencies and convenience. "But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *Chadha*, 462 U.S. at 945. Under the constitutional plan, expedience is not valued over adherence to the rule of law. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives —or the hallmarks—of democratic government . . . ." *Bowsher*, 478 U.S. at 736 (*quoting Chadha*, 462 U.S. at 944).

B. *This Court's Decisions Reflect An Insistence That Congress Make Tax Law In A Manner Consistent With The Constitutional Plan.*

In seeking to rationalize Congress' effort in this instance to avoid its traditional responsibility for making tax policy and setting tax rates, the Government points to other instances, not involving general revenue raising, in which a delegation has been sustained. The Government's arguments are fundamentally flawed, however, by their failure to distinguish between two lines of cases. These cases recognize that revenue raising, *i.e.*, the imposition of taxes to fund general governmental activity, rests on a different set of constitutional principles than other legislative devices (such as charging fees for government services) that only incidentally raise money.

1. *National Cable* and *New England Power*. Under facts virtually identical to those at issue here, this Court in *National Cable* and *New England Power* enunciated a

means of distinguishing the exercise of taxing authority from other money raising devices. The holding of *National Cable* was that when an agency attempts to impose assessments to cover generally the costs of its regulatory operations, without linking it to the costs that a particular firm has imposed on the agency, "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341.

The lower courts have had little difficulty applying this distinction.[18] *See, e.g., Central & Southern Motor*

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[18] The lower courts' application of the *National Cable* distinction between permissible fees and impermissible taxes has occurred in cases both under the IOAA and in cases involving other statutes conferring fee-setting authority.

Under the IOAA: *Phillips Petroleum Co. v. FERC*, 786 F.2d 370 (10th Cir.) (fees charged for processing tariff filings and responding to other specific requests), *cert. denied*, 479 U.S. 823 (1986); *Central & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722 (D.C. Cir. 1985) (fees charged for processing rate tariff applications and approving rate agreements); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12 (1st Cir. 1982) (fees charged for processing nuclear reactor licenses); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223 (5th Cir. 1979) (fees charged for processing applications for nuclear reactor licenses and permits), *cert. denied*, 444 U.S. 1102 (1980); *Air Transport Ass'n of America v. Civil Aeronautics Board*, 732 F.2d 219 (D.C. Cir. 1984) (fees charged for processing tariff filings and other documents that required CAB action).

Other statutes: *Sohio Transp. Co. v. United States*, 766 F.2d 499, 502-04 (Fed. Cir. 1985) (applying *National Cable* to the Mineral Leasing Act); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929-33 (10th Cir. 1983) (applying *National Cable* to a revenue raising delegation in the Federal Land Policy and Management Act); *Alumet v. Andrus*, 607 F.2d 911, 916 (10th Cir. 1979) (same); *City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977) (applying *National Cable* to a revenue raising delegation in the Federal Water Power Act), *cert. denied*, 439 U.S. 818 (1978); *Alaskan Arctic Gas Pipeline Co. v. United States*, 9 Cl. Ct. 723, 738-39 (1986) (same), *aff'd*, 831 F.2d 1043 (Fed. Cir. 1987).

Freight Tariff Ass'n v. United States, 777 F.2d 722, 725 (D.C. Cir. 1985) (under *National Cable*, federal agencies may not impose "fees or assessments [that go] beyond the recovery of costs for benefits conferred upon identifiable beneficiaries" because such assessments are "more conceptually akin to taxes, which could, of course, be levied only by Congress"); *Nevada Power Co. v. Watt*, 711 F.2d 913, 929 (10th Cir. 1983) (under *National Cable*, an "applicant may not be charged for work relating to the agency's general costs of administration"); *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 228 (5th Cir. 1979) ("what the Court found objectionable" in *National Cable* "was the agency's attempt to recover the entire cost of regulating"), *cert. denied*, 444 U.S. 1102 (1980).

Like the assessments in *National Cable*, the assessment on Mid-America does not reflect the costs that it has imposed on the agency. Mid-America has not requested or received any service from DOT in exchange for which Section 7005 assessments are being charged. These annual charges are plainly not "for specific services to specific individuals or companies." *New England Power*, 415 U.S. at 349.[19] It was precisely on this basis that *New England Power* rejected the attempt of the Federal Power Commission to impose an industry-wide fee on natural gas pipelines designed to recoup the costs of administering the Natural Gas Act.

There is nothing obscure about the distinction between fees, which raise no constitutional concern, and the kind of revenue raising activity with which the Framers were primarily concerned in the Origination Clause. Fees are

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[19] Indeed, the Department of Transportation did not need Section 7005 to impose "specific fees for specific inspections," for it possessed that authority already. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). The surest indication that Section 7005 does not meet the test established by *National Cable* is the fact that even without Section 7005, DOT had the authority to set the charges *National Cable* allows.

what the Government charges for services performed. Premised on a basic *quid pro quo* relationship, fees are measured by the specific costs that an individual firm imposes on a government agency; if the agency can determine those costs, and link them to a given firm, there has been no discretionary revenue generated, merely reimbursement for costs incurred.

In terms directly pertinent to this case, DOT might have chosen to charge Mid-America for the direct and indirect cost of inspecting Mid-America's pipelines; the Department of Transportation has long had the authority to do precisely that. *See* H.R. Rep. No. 300, 99th Cong., 1st Sess. 494 (1985). That is far different than raising money so that DOT can give grants-in-aid to the States, or fund its research projects, or conduct rulemaking or standard-setting, or attend interagency meetings, or give presentations to industry groups, or the host of other expenses incurred by the agency for the general welfare—all of which are to be recovered under Section 7005.[20] When the agency seeks to finance those costs, it

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[20] In this sense, Section 7005 is unlike Congress' delegation of revenue raising authority to the Nuclear Regulatory Commission ("NRC") in COBRA Section 7601. *See Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988). Congress' instruction to the NRC to recover thirty-three percent of the costs of nuclear power plant licensing and inspection programs through a system of fees (*see* COBRA § 7601(a), 100 Stat. 146-47), was far narrower and much more akin to a traditional fee than that involved here. Much as this Court prescribed in *National Cable*, the delegation in Section 7601 was constrained by two specific statutory directions absent here: annual charges had to be (1) "reasonably related to the regulatory service provided by the Commission" and (2) had to "fairly reflect the cost to the Commission of providing such service." 846 F.2d at 775. In addition, Congress directed the NRC only to recover a third, not all, of its regulatory costs. These factors are crucial because the thirty-three percent of its budget that the NRC could recover under Section 7601 was related—in the view of Congress—to the services that the agency provided the industry. The agency's levy, therefore, was an approximation of the cost of services rendered in a manner closely akin to determinations involved in applying the IOAA.

is engaged in precisely the kind of revenue-raising activity, albeit on a specialized scale, with which the Framers were concerned.

The Government responds to this elemental distinction with the argument that statutes like Section 7005 involve only fees because they merely require entities to finance a "program of regulation made necessary by that [taxpayer's] activity." Gov't Br. at 21. This argument—apart from conflicting with the precise holding of *National Cable*—proves too much. In one way or another, private activity is the reason for most of government; if executive agencies need only collect "fees" to finance activities they feel "compelled" to provide, the "fee" exception would quickly engulf the power to tax.[21] Soon, much of government would be deemed to have been "made necessary" by private conduct the Government seeks to regulate, and political accountability for developing tax revenue to fund such regulation could be jettisoned under the expedient label of "fees." There is no demonstrable difference in this regard between the regulatory scheme at issue here and various other administrative programs to which companies like Mid-America are subject—programs administered, for example, by the Federal Energy Regulatory Commission (which has already received such a grant of taxing authority), the Occupational Safety and Health Administration, the Mine Safety and Health Administration, the Federal Communications Commission, the Interstate Commerce Commission or a host of other regulatory entities.

2. *Hampton* and *Head Money Cases*. Relying on their construction of a dictum in *J.W. Hampton, Jr. & Co. v.*

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[21] The natural extension of the Government's argument is that if a person or company exists, it must pay "fees" to compensate the Government for its right to exist as opposed to paying taxes which are determined by elected officials.

United States, 276 U.S. 394 (1928), and the *Head Money Cases*, 112 U.S. 580 (1884), the Government argues that irrespective of the Court's more recent decisions in *National Cable* and *New England Power*, an attempt to delegate the power to tax is not to be distinguished from any other type of delegation. Gov't Br. at 15. Contrary to the Government's suggestion, the Court in *Hampton* and *Head Money* neither reached nor resolved such issues.

At issue in *Hampton* was the authority of the President to determine equalizing tariffs for the myriad goods coming into the United States, country by country, all according to a strict formula established by Congress and factual determinations that Congress had directed the President to make. The petitioner in that case sought to characterize the establishment of these tariffs, which mirrored many similar delegations of power to the President in the area of foreign commerce (*e.g.*, *Field v. Clark*, 143 U.S. 649 (1892)), as nondelegable because the power to "levy taxes and fix customs duties" was nondelegable. 276 U.S. at 395-400. This Court held that the same principles that allowed Congress "to remit to a rate-making body . . . the fixing of . . . rates justifies a similar provision for the fixing of customs duties on imported merchandise." *Id.* at 409. The holding of the Court reflects the difference between imposing fees, as a method of regulating commerce in some field, and raising revenue for the general funding of government—the issue with which the Framers, in the Origination Clause, and this Court, in *National Cable*, were primarily concerned.[22] The President's broad authority in

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[22] The Government makes the same mistake when it argues that *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), a case that involved a challenge to the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, and "which allowed the President to raise license fees on imports *when he found that such action was needed to protect the national security*," (Gov't Br. at 18 (emphasis added)), also involved the issue of delegation of the taxing power presented here. *Id.*

the field of foreign affairs would fully warrant a broader grant of discretionary power to the President over tariffs than over a domestic revenue raising measure like Section 7005. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).[23]

For similar reasons, the other case primarily relied upon by the Government, *Head Money Cases*, 112 U.S. 580 (1884), has no relevance here. In *Head Money*, *Congress* had specifically set the imposts at issue at $.50 a head on each person entering the United States by ship. The case thus did not present, let alone decide, any issue of delegation or exercise of executive authority. The Court in *Head Money* held merely that "in the exercise of its power to regulate immigration," Congress had an *independent* constitutional basis for setting the duties quite apart from its taxing authority. 112 U.S. at 596. As the Court explained:

> The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the act, "An Act to regulate immigration," is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.

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[23] Equally important, the delegation to the President in *Hampton* was, in fact, well-constrained. Congress directed the President to make findings about the relative costs of production abroad and to employ tariffs to equalize those costs. Although fact-finding was involved, the President's substantive discretion was closely "canalized" by Congress. Unlike here, the President was not afforded the discretionary authority to determine by rule what he viewed as reasonable.

Id. at 595. *Head Money*, in short, involved an entirely different set of constitutional concerns (having to do, on the one hand, with the relationship between state and federal power and, on the other, with the scope of Congress' power to regulate foreign commerce) than are at issue here. In particular, the preservation of legislative accountability for making tax law, as required by the Origination Clause, was not the constitutional value that motivated or informed the Court's analysis.[24]

Notwithstanding the distinction between the *Hampton/Head Money* decisions and *National Cable/New England Power*, the Government implies that this Court somehow overlooked its earlier precedents when deciding *National Cable*. In fact, however, the Court's opinion in *National Cable* not only cites but quotes directly from *Hampton*, making it clear that the sort of commerce-related tariffs at issue in *Hampton* were fully understood by the Court as it reached its decision in *National Cable*. Drawing on the constitutional values underlying the Origination Clause, the Court in *National Cable* set forth with some precision a means for distin-

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[24] *Clyde Mallory Lines v. Alabama ex. rel. State Dock Comm'n*, 296 U.S. 261 (1935), also cited by the Government (Gov't Br. at 22), is even less apposite. That case involved a challenge to a state harbor fee on the basis that such a state charge violated the Constitution's prescription against attempts to set "taxes and duties . . . [imposed] for the privilege of entering a port," (art. I, § 10, cl. 2). There the Court held no more than that the harbor fees in question were not imposed by the State for the privilege of entering a port, but rather to pay the cost of harbor services.

Finally, the Government's passing reliance on *Massachusetts v. United States*, 435 U.S. 444 (1978) (Gov't Br. at 23 n.12), has special irony: the statute at issue in that case was a paradigm of how Congress is supposed to act when it wants to raise revenue to finance a regulatory program. The Airport and Airway Revenue Act of 1972 involved no unbridled delegation to apportion a tax. Congress fixed the taxes on the use of the nation's airways, determining in each instance the specific amount of the tax, who should pay what, and the basis on which the tax should be assessed. Although these assessments were also "user charges" in some sense, Congress did not hesitate to label them what they were—taxes.

guishing between delegations of taxing authority, on the one hand, and delegations of a more limited authority (like fee-setting or tariff-setting), on the other hand, and held, on facts identical to those presented here, that the taxing power (in the strict constitutional sense) is involved when federal agencies fund general programs of regulation. In reaching that conclusion, the Court relied on a principle—that "Congress [] is the sole organ for levying taxes . . ." (415 U.S. at 340)—that matches precisely the sentiments of the Framers underlying the Origination Clause. The distinction drawn in *National Cable* is thus entirely consistent with the Constitution's requirement that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[25] Section 7005 creates a method of revenue raising that flouts that constitutional command.

III. The Exercise Of Tax-Setting Authority Authorized By Section 7005 Cannot Fairly Be Characterized As An Executive Function.

Quite apart from Section 7005's departure from the Constitution's specific prescription for revenue raising, there is a second, equally fundamental flaw in Section 7005's approach to the making of tax law. The constitutional principles underlying separation of powers proceed from the fundamental notion that legislative power is granted to Congress, executive power is granted to the Executive, and the courts will develop decisional rules (often analyzed under the rubric of "delegation" principles) to distinguish and maintain separation between the two. And as a corollary: If the Constitution's careful apportionment of powers among the three branches

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[25] In requiring that "[a]ll Bills *for raising Revenue*" be initiated in the House of Representatives, the Framers quite purposefully did not intend to include legislative measures "under which money might incidentally arise." 5 *Elliot's Debates*, *supra*, at 415 (Mason). *See generally*, 1 D.K. Watson, *The Constitution of the United States* 345-46 (1910).

is to have any meaning, it is necessary to posit at least *some* limitations on the ability of the Legislative Branch simply to assign issues to the Executive Branch for decision. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).[26] In Section 7005, Congress simply defied this principle by transferring unadorned legislative power to make a taxing decision to an executive agency.

It is true, of course, that even as the Court has reiterated the principle that the legislative power may not be delegated, it has not shied from the reality that executive officers may be allowed a genuine discretion to make binding rules.[27] "A practical construction of the Constitution" often requires Congress "to invest the President with large discretion in matters arising out of the execution of statutes":

> The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must,

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[26] *See also J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

[27] The Court has generally characterized such Executive rule-making as "quasi-legislative." *See Chadha*, 462 U.S. at 953 n.16; *Wright v. Nagle*, 101 U.S. 791, 792-93 (1879); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). As noted earlier (pp. 18-19, *supra*), however, the Executive's power to enact "quasi-legislative" rules in the tax area is carefully circumscribed.

> therefore, be a subject of inquiry and determination outside of the halls of legislation.

Field v. Clark, 143 U.S. at 694 (*quoting from Locke's Appeal*, 72 Penn. St. 491, 498).[28] In every instance in which the Court has sustained a delegation of substantive authority to the Executive Branch, however, there has been something more, some consideration allowing the conclusion that what the Executive was doing was not *merely* deciding what the Congress ought to have decided—*i.e.*, making the law—but rather performing some properly executive role of which that rulemaking was but a part. The issue thus remains to be determined in connection with any delegation whether an executive official is, in truth, being asked to perform a task that is properly described as "execution of the law in constitutional terms." *Bowsher*, 478 U.S. at 732-33.

Two factors have historically guided this Court in determining whether a grant of authority to an executive official is within the authority of Congress to give and executive officials to receive: *First*, the Court has looked to the nature of the power being exercised in light of the constitutional division of powers. *Second*, the Court has considered the extent to which Congress might have rationally concluded that the best way of meeting a given problem is by creating some ongoing program, which it allows officials of the Executive Branch to "faithfully execute."

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[28] As described in *Field v. Clark*,

> Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do [upon forming a judgment that the named contingency had arisen] was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Id. at 693.

A. *Allocating Tax Burdens Is Peculiarly Within The Competence Of The Legislative Branch And Beyond The Competence Of The Executive Branch.*

Not surprisingly, it is necessary to look at the nature of the power being assigned in judging the constitutionality of any delegation. *See Lichter v. United States*, 334 U.S. 742, 778 (1948) (propriety of delegation depends upon "the nature of the power being delegated"). Scrutiny of Congress' decision to delegate authority is necessarily "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).

In the field of foreign affairs, for example, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 320 (1936). *See also Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 & n.10 (1976); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). In connection with foreign relations and matters incidentally affecting foreign relations, Congress might justifiably conclude that it should not make some important decision because, under the system of overlapping authority set forth in the Constitution, the President can *better* make that decision.[29] The framework of institutional responsibility set forth in the Constitution, making the President the representative of the United States in dealings with foreign governments and authorizing the President alone to negotiate treaties, verifies that conclusion.

No suggestion could be made that the Executive Branch enjoys special competence to set tax rates. The opposite

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[29] *See also The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813) (authority to lift an embargo); *Field v. Clark*, 143 U.S. 649 (1892) (duties on foreign imports); *Hampton* (flexible tariffs); *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (quality of imported teas); *Lichter* (war powers reformation of subcontracts).

is true. And if, as appears to be uniquely true of the tax power, the Constitution not only offers no support for the notion of overlapping substantive authority in the Executive, but appears to associate taxing decisions with the unique characteristics of the legislature, any prerogative Congress might otherwise have to delegate away its authority would have no application to taxation.

Congress cannot justifiably believe that the Executive Branch is better positioned to make the taxing decision because, in the terms in which the Constitution deals, taxing decisions are better made by persons who must hear and respond directly to the democratic will. Constraints on the taxing power that flow from the political accountability of legislators are difficult to transfer through "standards" imposed on the Executive. As Dean Freedman concludes:

> When a constitutionally assigned power is by its nature peculiarly resistant to the formulation of governing principles and standards, the indications become strong that the Framers placed a deep reliance for its proper exercise upon the unique qualities—the institutional competence—of the body to which it was assigned. . . . The power of Congress to levy taxes [is] of this character.

J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 88 (1978).[30]

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[30] Dean Freedman explains the notion of "institutional competence" as follows:

> Congress is the national institution that takes its character most directly from the political responsiveness of its members. In addition, senators and representatives, elected and subject to reelection by states or local constituencies, constitute a legislative institution of broad-based diversity. These characteristics serve to define the unique institutional competence of Congress for purposes of levying taxes.

Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 325 (1976).

The need to assess the nature of the power when evaluating a particular delegation is further illustrated by the distinction between fees and taxes drawn in *National Cable*. A seemingly obvious point overlooked by the Government is that the "fee/tax" distinction, imbued with such significance by the Court in that case, would make little sense if delegation of the taxing power were not to be subject to some more rigorous analysis than was applied in other fields. In distinguishing between fees and taxes, however, the Court in *National Cable* was acknowledging the basic fact that there are certain *types* of decisions the Executive Branch is less *constitutionally* competent to make. Mere "fee setting" encompasses none of the discretionary choices involved in raising revenue. In setting fees, an agency need not decide who is to be charged (only those who receive services may be assessed fees), or more importantly here, how much is to be charged (since fees are set according to the cost of providing the service). By contrast, revenue raising involves a far more judgmental inquiry. An agency that sets out to determine who should pay what in order to fund a program of research, or to finance the salaries of the rulemakers, or to fund grants to the States, involves itself in a far more ambiguous inquiry. Resolution of competing issues of fairness and equity is well suited to the legislative process, as the Framers intended it. However, allocating the burden of taxation among the citizenry—whether on a large or small scale—"carries [the Executive Branch] far from its customary orbit. . . ." 415 U.S. at 341.

National Cable thus implements, specifically in the tax area, the more general principle, long recognized by this Court, that the nature of a power affects the permissible limits of its delegation. *See Lichter*, *supra*; *Curtiss-Wright*, *supra*. There are further differences in the taxing power, beyond those invoked in *National Cable*, which explain why the taxing power has not been delegated even as Congress has freely assigned the Executive

broad discretionary authority in other governmental enterprises. As the *quid pro quo* for virtually any delegation to an administrative agency, we demand the right of judicial review, to monitor the agency's actions and ensure its consistency with the legislative intent. Whether that is a good or poor substitute for the right to have an issue determined through the *legislative* process is subject to debate. But in the field of taxation, the right to judicial review is ephemeral because the equitable and subjective nature of the relevant determination renders the ultimate decision virtually unreviewable in a court of law:

> The same discretionary character of taxation that ordinarily shields it from effective judicial review should also make legislative oversight of a delegate difficult. *Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress.*

L. Tribe, *American Constitutional Law* 366 n.15 (2nd ed. 1988) (emphasis added).

Finally, in taking account of the nature of the power to be delegated, this Court has looked to the imperatives of the exercise of a particular governmental power and measured delegations of that power against the basic purposes for which the power was assigned to Congress in the first instance.[31] Thus, in *Lichter v. United States*,

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[31] Although the taxing power may be *sui generis* in this regard, there are one or two other candidates for that conclusion. *See* L. Tribe, *American Constitutional Law* 362 (2nd ed. 1988) ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility"). *See also Wayman v. Southard*, 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given

this Court emphasized that "the primary implication of a war power is that it shall be an effective power to wage the war successfully." 334 U.S. at 782. The broad purpose of the power anticipates innovation in the manner in which Congress may employ it. Even with respect to "ordinary" legislative efforts, addressing common domestic concerns under the Commerce Clause, the breadth of Congress' legislative canvas suggests the need for a similar flexibility in order to make law capable of governing the Nation. The facts and circumstances that Congress seeks to address are not always susceptible to solution by an inflexible statutory rule. Thus, it is not difficult to view an allowance of power to the Executive, to act flexibly and draw balances as they arise, as necessary to implement that type of power.

But in this respect too, the taxing power is dissimilar. The commands of the exercise of that power intuitively suggest a different scope of action, one that is fully within the ordinary competence of a legislative body to address. Taxing decisions were to be made centrally for the whole of the country.[32] And history confirms the absence of any

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to those who are to act under such general provisions, to fill up the details.")

Consider, for example, the power of Congress to impeach and convict a President for "Treason, Bribery, or other High Crimes and Misdemeanors." U.S. Const., art. II, § 4. As Dean Freedman explains:

> The Framers regarded the institution of impeachment as "preeminently a political process, likely to agitate the passions of the whole community." It was, as Hamilton wrote in *The Federalist*, "a method of NATIONAL INQUEST into the conduct of public men," best assigned to "the representatives of the nation themselves."

Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-27 (1976) (citations omitted).

[32] Whatever meaning one might attribute to the Uniformity Clause (art. I, § 8, cl. 1), it certainly would not allow for subordinate authorities to apply different rules geared to different balances in different areas of the country.

customary reliance on the subordinate authority of the Executive to allocate the tax burden among the citizenry. There is assuredly nothing about the choice of the formula in this case that suggests that the imperatives of the taxing power demand legislation with a broad brush—and thus a substantive lawmaking role for the Executive in its exercise.[33]

B. *Under Section 7005, The Secretary Has Been Directed To Make A Law And "Faithfully Executes" Nothing.*

In determining whether the exercise of any delegated lawmaking authority is, in truth, the execution of the law, the Court has also considered the nature of the congressional purpose that prompted a grant of authority to the Executive. In approving any number of broad congressional initiatives, this Court has declined to question Congress' decision to assign quasi-legislative authority to executive officials where invalidation of the delegation might have deprived the federal government of the only effective means of exercising the power granted it by the Constitution. Where Congress has chosen to address some concern through the creation of a program that requires a flexible approach to various and varying conditions, the Executive Branch is, of course, the only branch that can properly execute that approach. Implementing that approach is, therefore, by definition, the execution of the law. *See Hampton*, 276 U.S. at 406.[34]

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[33] The fact that a bill was introduced apparently solving this problem, (*see* note 5 *supra*), by adopting the same type of formula the Secretary adopted, only emphasizes the ease with which this determination could have been made by Congress.

[34] *Hampton* described the reason why agencies may set rates for the purpose of regulating commerce:

> Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it

Where such circumstances exist, this Court has limited its inquiry to the question whether Congress has provided an intelligible principle to the Executive to limit, in some way, the Executive's actions. *See Hampton, supra.* An extraordinary range of constitutional scholars have challenged the effectiveness of this standard, however, and have agreed that meaningful limitations on the ability of Congress to assign away its basic lawmaking responsibilities are essential to the maintenance of our representative government.[35] Many of these scholars tend toward the view that the Court's cases have been too lenient in

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would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission . . . to fix those rates . . . . "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic . . . ."

276 U.S. at 407-08 (citations omitted).

[35] *See* J. Ely, *Democracy and Distrust* 131-34 (1980); T. Lowi, *The End of Liberalism*, ch. 5 (2d ed. 1979); L. Tribe, *American Constitutional Law* 362-69 (2nd ed. 1988); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 63-67 (1982); Freedman, *Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307, 326-31 (1976); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985); Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and the Delegation of Power*, 72 Nw. U.L. Rev. 443, 454 (1978); Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 584-85 (1972). *See also Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

Of course, there are proponents the other way. The Government cites Mashaw, *ProDelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81 (1985), in support of its position.

applying the "intelligible principle" standard, leaving fundamental policy decisions to administrative agencies.

We proceed from a more fundamental tenet: To declare that *all* facets of *all* legislative power may be delegated subject only to an "intelligible principle" standard —irrespective of the precise legislative function at issue and wholly apart from the broader statutory context in which the delegation is made—is to go well beyond the confines of either "common sense" or the "practical necessities" of government. *Cf. Hampton*, 276 U.S. at 406. In particular, there is no support either in the case law or in the text of the Constitution to support statutes that allow executive officials to make law where the only colorable rationale for that grant of authority is Congress' unwillingness to make a particularly hard choice. On the contrary, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Chadha*, 462 U.S. at 953 n.16 (*quoting Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

Thus, there is no need to reach the application of the "intelligible principle" standard in this case. The application of that standard always presupposes other conditions. As the Court suggested in *Hampton*, although there will certainly be times when the administration of government requires Congress to invoke the assistance of the other Branches—as when "common sense and the inherent necessities of the governmental coordination" warrant it (276 U.S. at 406)—the Constitution limits such requests for assistance when "the action invoked" involves the "assumption of the constitutional field of action of another branch." *Id.* at 406. The bare instruction to an executive officer to make a decision for which Congress is unwilling to take responsibility cannot, in this sense, be said to be a constitutionally legitimate request for the Executive to implement the law.

In short, in every case in which the Executive Branch has been given substantive discretion to aid in execution of a congressionally established program, there has been a program to execute, rather than merely a decision to make. The existence of those conditions allows the Court fairly to characterize the Executive Branch's exercise of a delegated power as encompassed within the constitutional term, the "faithful execution of the law." This Court has never gone so far as to authorize an unadorned attempt by Congress to relieve itself of the responsibility for a politically sensitive decision, such as allocating the burden of a tax, by passing that decision to the Executive.

C. *Section 7005 Impermissibly Assigns The Decision How To Allocate The Tax Burden To Executive Officials.*

Measured against the foregoing, it strains the Constitution's division of powers to the breaking point to consider the setting of tax rates to be an executive function. Under Section 7005, Congress has disrupted the balance between the Legislative and Executive Branches by assigning a responsibility to executive officers, the allocation of the burden of taxation, that institutionally belongs to Congress. This is so because (1) the task of fixing tax liability is by its nature a task for elected officials which Congress alone can perform, and (2) the assignment of this single, politically sensitive choice to a cabinet officer cannot in any case meaningfully be characterized as "*execution* of the law in constitutional terms." *Bowsher*, 478 U.S. at 732-33 (emphasis added).

This is not a case where "common sense and the inherent necessities of the governmental coordination" have impelled Congress to seek the assistance of the Executive, but is merely an effort to shirk constitutionally imposed responsibilities. Under Section 7005, Congress' breadth of vision did not demand that it describe its objectives in bold strokes, leaving the details to be filled

in as situations and facts presented themselves. *See Field v. Clark*, 143 U.S. at 694; *United States v. Grimaud*, 220 U.S. 506, 516-17 (1910); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Nor is this a case "where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *Lichter*, 334 U.S. at 785. The exigencies of legislating here suggest neither "the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 424 (1944). This is also not a case where, upon the finding of certain facts, or the occurrence of certain contingencies, an executive officer was empowered to act to implement the congressional will. *See Hampton*, 276 U.S. at 407.

On the contrary, what was involved here was the delegation of a choice that has historically been regarded as peculiarly legislative—establishing a formula under which it would be determined who would eventually have to pay what share of the Government's costs. If in Section 7005 Congress had itself set the formula for assessing that tax, fixing the rate, or allocating a given company's share, leaving it to the agency to compute or enforce the assessment established by Congress, there would have been no constitutional problem. Instead, it left the rate decision to the agency. Indeed, as if to confirm the fact that it was leaving a single taxing issue to the agency for decision, Congress presented a multiple choice to the agency about how it might choose to set the formula. The choice was to be the agency's and the agency's alone.

As such, Section 7005 presented a decision that—precisely because it involved taxes, and someone's ox would be gored by the choice of any basis for apportioning those taxes—Congress was unwilling to make itself.[36] That the Framers sought, in the plainest terms, to ensure that

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[36] Nothing, of course, prevented Congress from receiving testimony from the agency about the formula the agency viewed as

elected representatives would, in fact, make the taxing decisions, only emphasizes that the escape from accountability embodied in Section 7005 is fundamentally at odds with the constitutional plan. Absent the dressing of an administrative program to conceal it, the delegation to the Secretary of Transporation here stands as a naked delegation of legislative power; the power to make law, without more, cannot also be the execution of the law. Thus, what is starkly at stake is congressional abnegation of its own legislative responsibilities in a uniquely "legislative" area, and the attempt to thrust upon the Executive Branch the very lawmaking power that, by tradition and competence and the terms of the Constitution itself, would extend the Executive well beyond its charter.

Despite trends in that direction,[37] we have not yet reached the point where all regulatory agencies have been charged with the responsibility of finding the means of financing their activities under authority of enactments similar to Section 7005. But just as the "accretion of dangerous power does not come in a day [but rather

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most suitable and then—after opening itself to additional comment by constituents—voting that suggestion into law. The only difference would have been that in *that* case Congress would have been directly and immediately accountable for the decision *it* had made; the way it did it, it avoided that accountability.

[37] Perhaps the most extreme example of Congress' willingness to give broad and unconstrained revenue raising authority to a federal agency is in its delegation to the Federal Energy Regulatory Commission ("FERC"). *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-91. Specifically, Section 3401 gives FERC the power to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." Section 3401(a). The only standard Congress sets forth in the statute to guide FERC's formulation is the instruction that the charges be "fair and equitable." Section 3401(b). The statute also permits FERC to select which entities or classes of entities from among those the agency regulates are to be taxed.

arises] slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority,"[38] the progressive refusal of the Legislative Branch to bear its own constitutional burdens, burdens imposed on the legislature precisely because of its more immediate accountability to the electorate, threatens the foundations of democratic government. That Congress appears to be abjuring its responsibility in increments is no cause for this Court to accept that result. *See* Brief by Amici Curiae Chamber of Commerce of the United States, *et al.* Where, as here, this Court is able to identify in Congress' action the plain avoidance of its constitutional responsibilities, through the assignment of duties to a branch of government that is not empowered to execute those duties, this Court is obliged to reaffirm the constitutional plan.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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[38] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).